

CASE NUMBER: 18-2153

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

J.F.S, *a minor child, by next friend and sibling*, MATTHEW P. STARBUCK

Plaintiff - Appellant

V

WILLIAMSBURG - JAMES CITY COUNTY SCHOOL BOARD

Defendant - (*Not in interest*)

BRIEF OF GUARDIAN OF PLAINTIFF - APPELLANT

Appeal from the

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

NEWPORT NEWS DIVISION

CIVIL ACTION NUMBER 4:18cv63

HONORABLE MARK S. DAVIS, *presiding.*

On Brief of Guardian Appellant



Matthew P. Starbuck

General Guardian of Minor Plaintiff J.F.S.

4615 Sir Gilbert Loop

Williamsburg, Virginia

23185-7947

757-561-6588

On Supporting Brief

(SIGNATURE REDACTED)

J.F.S

Minor Plaintiff

4615 Sir Gilbert Loop

Williamsburg, Virginia

23185-7947

I. STATEMENT CONCERNING DEFENDANT STATUS

This appeal is brought before this court in from the DISMISSAL ORDER issued on the 10th of September, 2018. The trial court DISMISSED this action WITHOUT PREJUDICE for a lack of representation for the minor plaintiff in this action, citing *Gallos v United States*, which held that parents and guardians generally not be allowed to litigate for minor children. Due to the nature of the docket of the trial court, no summons was issued for the defendant, so no service was effected, while the complaint was filed by the trial court, upon approval of the *Motion to Proceed In Forma Pauperis. Show Cause*. As such, the defendant is assumed unaware that this action is pending, as it was dismissed pre-service of process. Defendant shall only be granted to brief counter argument with leave of this Court.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellate courts in the United States are almost unanimous in disallowing oral arguments except where there is still dispositive issues to resolve after assessment of the briefs provided. The intensity of the arguments presumed under this brief, being written by a *pro se* litigant. Mr. Starbuck, guardian for J.F.S, recommends this Court hear statements from him and J.F.S, in ability to fully understand the standing of the allegations in the complaint, and the assignments of error of the trial court and could be critical in this Court understanding the nuances in which it would greatly benefit.

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28 U.S.C [Section] 1654

V. JURISDICTIONAL STATEMENT

1. JURISDICTION IN THE DISTRICT COURT

The district court had jurisdiction of this action pursuant to their scope in all civil matters of federal question, laws of the United States, and of matters arising from violations of Constitutional rights by government officials. The defendant is a quasi corporation, as defined by the Code of the Commonwealth of Virginia, 1950, and during all times relevant, acted under color of the Commonwealth of Virginia, as they derive their authority therein.

In the instant matter at hand, J.F.S, was wrongfully treated and suspended from school by school officials at Jamestown High School, and his due process was violated further by the School Board of Williamsburg - James City County. J.F.S, who is at time of filing, a minor child, and during the time of the cause of action, a minor child, and at the time of the cause of action, was a junior in high school. J.F.S is now a senior, and prompt resolution of this matter is required due to pressing time concerns.

2. JURISDICTION OF THE APPELLATE COURT

This Court has jurisdiction over this action on appeal from the final judgement entered by the district court on September 10, 2018.

3. TIME COMPLIANCE AND PERFECTION OF APPEAL

The district court judgment was executed September 10, 2018 and entered of the same. Plaintiff submitted the Notice of Appeal on September 13th, 2018 and again on the 28th of September, after delivery failure of the United States Postal Services which, which became effective on that date by postmark and the record was transmitted on October 2, 2018.

4. FINAL JUDGEMENT

This appeal is from a final judgement issued in this action, in which the district court entered into its order a certificate of appealability to this Court. This appeal only resolves the dispositive issues of the plaintiff, as the defendant has not had service effected on them by the district court and United States Marshall, pursuant to Rules of Civil Procedure.

VI. STATEMENT OF ISSUES

1. Did the trial court err in dismissing this action for the reasons it cites in its dismissal?
2. Did the trial court err in failing to allow for the appointment of counsel?
3. Did the trial court overstep their judicial boundaries by, in essence, ruling on the merits of the case, without considering any evidence which would be entered?
4. Did the trial court err in failing to “protecting the rights of the child” as it is so bound?
5. Did the trial court prejudice the plaintiff over income and failure to retain private counsel, when shown that even the Legal Aid Society of Virginia could not staff the case due to training and experience issues?
6. Did the trial court prejudice the plaintiff in its two month delay between responsive pleadings to the ORDER TO SHOW CAUSE and the DISMISSAL ORDER?
7. Did the trial court err in considering all of the merits of the Complaint, wherein it only considered the initial suspension of the minor and not the appellate phase of the incident?

VII. STATEMENT OF THE CASE

In this action, a minor, J.F.S, was wrongfully charged and suspended by the School Board of Williamsburg - James City County, the defendant not in interest of this appeal. In the Complaint, the defendant is accused of infringing on the minor's fourteenth and first amendment rights to due process under law and freedom of speech and expression.

On February 14th, in Parkland, Florida, this Court is aware of the horrific school shooting which had occurred. A male suspect went into the school and killed seventeen students and injured multiple others. The social impact of this event was on a grand scale, making mainstream news outlets across the country and world, and as such, was a major talking point across American high schools across the country. Jamestown High School was no exception the next day, as before his first period English class, J.F.S, a minor child, who is pursuing this action by and through his next friend and older sibling, Matthew P. Starbuck, was conversing with students about the horrific shooting in Florida the day prior. The students were "actively engaged in a conversation about the shooting...but were discussing observations and real world, practical problems. *Comp at 1-2*" At one point in the conversation, J.F.S, "noted the possession of explosives by the shooter and noted the use of the fire alarm used to lure students out...in addition noting the

time it took for law enforcement to enter.” *Compl. Id.* During the natural course of this discussion, no student involved made any threat, and all of the students involved were having a mature adult conversation, the conversations that America Needed to have about this sort of event. J.F.S remarks in the conversation were “reported to local police, who found the report unfounded, and to Jamestown High School...and in accordance of the Code of Virginia, to the School Board of Williamsburg - James City County. *Compl. Id.* The School [Jamestown High School] suspended J.F.S with full authority and scope of and instructions of the School Board. Matthew Starbuck and J.F.S, mother, Suzanne, who was recovering from a spinal surgery during the time of the cause of action, submitted a written appeal to the School Board. The School Board prejudiced the right of J.F.S, which are granted to him by the US Constitution and the School Code of Conduct, by failing to respond to the appeal within adequate time, as the response was returned on May 23rd. In their appeal, the School Board upholds the suspension, but alters the cause of the suspension. Much in criminal matters, causes of suspension act like specific code sections of law, describing the offense. They alter the cause of suspension from “Threats” to “Classroom Disturbance.” The plaintiffs disagree and alleged that the further amendment to the suspension is unlawful under a jeopardy.

(Namely, if the claim of “Threats” fail, they cannot double alleged facts, as he was never questioned about disruptive behavior.)

On June 13th, the District Court, and Hon. Mark S. Davis entered an ORDER to SHOW CAUSE to Mr. Matthew P. Starbuck, ordering him to find counsel or to show cause why the action should not be dismissed, stating in part:

“Mr. Starbuck, who does not appear to be a licensed attorney, seeks to litigate this action on behalf of J.F.S on a pro se basis. As this Court has explained: Although 28 U.S.C [Section] 1654 gives litigates the right to bring civil claims pro se, courts are nearly unanimous in holding that a parent or guardian cannot sue on behalf of a child without securing counsel.” *Gallo v United States*, 331 F. Supp 2d 446, 447 (E.D. Va. 2004) Noting that it “is generally not in the interest of a child to be represented by a non-attorney, who will likely be unable to adequately protect her rights and vigorously prosecute litigation on her behalf.”

The court references *Myers v Loudoun County Public Schools*, 418 F.3d 395, 401 (4th Cir. 2005) holding that “non-attorney parents generally may not litigate claims of minor children in federal court.”

On July 5th, Matthew Starbuck and J.F.S filed responses. (Matthew’s Response, (*Resp. ECF 4*) a Supporting Brief, (*Supporting Br. ECF 5*) and the J.F.S Memorandum in Support. (*J.F.S Mem. ECF 6*) which the court filed under seal, and

a non-signed version provided for public entry. On July 11th, Matthew Starbuck submitted an exhibit in support to his response, (*Exhibit, ECF 7*) containing a letter from Legal Aid Society of Virginia which states their inability to find counsel to accept this action.

In the responses, Matthew and J.F.S discuss the inability to hire counsel, and multiple attempts to do so returned fruitless. *Resp at 1. J.F.S mem at 1-2*. Mr. Starbuck admits he is not an attorney; however, asks the Court to allow im to proceed as he was the responsible party for all actions concerning this matter, that “he is competent to understand and file proper proceedings before this Court *Resp. at 4-5*”, he “works closely with J.F.S and the two work cohesively to act in the best interest of J.F.S *Resp. at 6*” and the two believe the unison of the two is sufficient to protect and defend the rights of the minor vigorously. Matthew furthers this by adding that he is able to understand and comply with the Federal Rules of Civil Procedure. Matthew adds that due to the nature of the case, and the highly politicized America we are in, “the possible political nature of the case prevents counsel interest. *Resp. at 9*” Matthew adds that despite him being eighteen,¹ and

¹ Matthew Starbuck is now 19, at the time of dismissal. J.F.S was 16 during the cause of action, and during appeal is now 17. J.F.S turns 18 in April of 2019, and is prejudiced if he must wait for this action to be heard once he turns 18 as this affects collegiate decisions.

J.F.S being seventeen, him and J.F.S should be allowed to proceed as they have, or the Court should appoint a guardian ad litem.

On September 10th, the trial court dismissed this action, citing the cases discussed in the ORDER to SHOW CAUSE. Matthew and J.F.S assign error to one or more points of the causes of dismissal and now appeal to this court to review, *de novo and on Abuse of Discretion*.

VIII. SUMMARY OF THE ARGUMENTS

The trial court in this action, so direly wanted this action to be brought by counsel, to the extent that the court itself is borderline prejudicing the rights of the minor child it seeks to willingly to “protect the interests of.” The Court delayed two full months between responses. While the appellants understand that the Court has multiple cases on docket, the delay of the response alone was prejudicial to the appellant. The trial court cites clearly between its ORDERS that it must act to protect the interests of the child, but then acts swiftly to prevent the dispositive issues from being raised. The defendant was not summoned in this action, despite the Complaint being filed. While the trial court states that it is “bound by the law,” *Dismissal Order, IV, 6, 1*, the basis of the judiciary is not to create the law, but to enforce and interpret it, to clarify it and read between the laws in general. The Eastern District of Virginia appears to have believed they have created a “law” in the citations to *Gallo v United States*, which they cite to prevent this case from proceeding. In fact, they created a clarification, which of its own MEMORANDUM OPINION, uses the term “generally” when referring to the exclusion of non-attorney parties from representing a minor child. While it can be agreed upon, that it is *GENERALLY* not in the interest of the child, especially

where the adult raises themselves as a co-plaintiff², as such the case in *Myers v Loudoun Co. Pub. Sch.* which the trial court cites. There are some cases where exceptions should be made. Exceptions are made at courts discretion, such as the cases allowing parents to litigate a minor's social security litigation on their behalf without counsel. The trial court erred in its reading of the citation and suggestion in the supporting briefs. The court read them literal to the terms of the words, and did not consider that if that is an exception, which was granted by a court, than courts are free to make exceptions as they feel need to which may arise. J.F.S references cases where IFP matters were filed and litigated by parents and furthers the clarification that an IFP was granted by the trial court, and that the trial court subsequently acted arbitrarily in a summary dismissal of this action. Further, the Court fails to fully consider the merits of the entire case, in its decision not to appoint counsel to represent the plaintiff.

² Matthew Starbuck is not joined as a plaintiff himself as he has no cause of action in this matter. Use of the term plaintiffs, while technically incorrect, speaks to the duo between Matthew himself, and J.F.S.

IX. STANDARD OF REVIEW

This Court reviews judgments as a matter of law *de novo* while it reviews matters of questions of or findings therein to the facts in *plain error*. This Court reviews discretionary judgments by the trial court's rulings for abuse of discretion.

X. ARGUMENTS FOR REVIEW

1. The trial court erred in dismissing this action without consideration for the rights of the minor to have his matter heard before the court.

The trial court was made aware of the previous litigation in State Court, which was wrongfully dismissed by the Circuit Court of Williamsburg - James City County after an argument of the joinder of the parties involved. The case was dismissed with prejudice and an appeal was denied as the Court denied a Motion to Appeal In Forma Pauperis. The Federal Court is the finality of the opportunities to correct the wrongs made to the minor.

The District Court, in its order, fails to clarify exactly how many law firms were contacted for retention. Mr. Starbuck contacted more than forty seven firms,

with only one who would even consider taking a federal case on a contingency basis due to the financial issues at hand. The one counsel who would consider taking the case, stated point blank that “you sign away your rights in the Code of Conduct.” Such comment, makes clear that this counselor was not a safe decision to “protect the rights of the minor.” The only person who has been able to clearly protect the rights, and fight for the rights of the minor, is Mr. Starbuck who has now been denied the opportunity to do so.

The District Court further fails to appoint counsel, ruling on the merits of the case, without seeing any evidence as such. The DISMISSAL ORDER is contradictory. It states that the case was dismissed for a failure of a non-attorney to protect the rights of the child, which is the Court’s responsibility to ensure, yet the Court arbitrarily applies the “substantial claim” approach under the the rules of *Hodge v Police Officers, 802 F.2d 58 (1986)* to refuse to appoint counsel, thus barring the claim from appearing before that Court, or any other Court with jurisdiction.

Further, the Court was provided the letter from Legal Aid of Virginia, who was unable to find counsel who was able to take this action. This shows that counsel for this action is hard to find to begin with, and even less likely when financial issues are at the root of an IFP application. Counsel will almost never

take a federal case on a contingency basis, considering the workload that federal courts bring; thus, the plaintiffs are forced to proceed pro se, and now, have perfected an appeal before this Court.

2. The trial court erred in an example of judicial overreach, dismissing the action without motion of the defendant.

This Court, in reviewing other actions, such as Myers v Loudoun County Sch. Brd, ruled that on appeal, it considered the pro se status of the father in the action, litigating for the children, but no such OPINION from this Court, or the District Courts have given preliminary jurisdiction of this matter to the District Court. As J.F.S spoke of the dismissal, “the court is to act like a mail sorter. They take what they are handed, and send it where it needs to go. The mail sorters do not create mail. The courts act on Motions and Pleadings, not on their own merit.” The trial court should have summoned the defendant, and allowed the defendant to raise this concern on their own merit. This action has now been dismissed prematurely as a result, without finality.

3. The trial court erred and acted with prejudice to the plaintiff regarding the pressing time concerns.

As the record filed by the CLERK will show, the district court took two months to respond to the Briefs and Responses of the Plaintiffs. This, combined with the running statute of limitations, bars this complaint from being heard before J.F.S will depart for college, and will further continue to prejudice him, if he is forced to wait until he is of majority to file.

4. The trial court erred in its interpretation of the *Maldonado* citation and suggestion from the supporting briefs.

Courts have held that, generally, it is not in the interest of a child to be litigated for, by a guardian. Generally is the primary focus in this assignment of error. Generally means that certain amendments and exceptions can be made to the rule as needed. Exceptions in this case are created by courts, as such is the case in the cited cases of the briefs. Those cases created exceptions. There is opportunity for this case to create a strict exception. Where a case exists, and it is not feasible to retain counsel, and when the guardian is able to exhibit that he or she may be able to understand to comply with Court rules and procedures, be allowed to proceed. The Court stated it was “bound by law.” The court is in fact bound by law,

but the Court failed to state which law it was bound too. No law prohibits guardians from litigating for minors, but courts have found it is in their own interest and for the interest of the judicial economy that this be prevented. This rule, as applied in this matter, is prejudicial to the rights of the minor, which again, the Court **is** bound to “protect” by its own citations in its ORDER to SHOW CAUSE and should have been exempted by the trial court.

5. The trial court erred in failing to “protect the rights of the minor” who’s guardian suffered a financial inability to pay the appropriate court costs, and as such could not pay the filing fee, or afford counsel.

As the trial court stated, “Although the Court appreciates the willingness of Mr. Starbuck to assist his sibling in his legal endeavors, the Court is bound by the law.” *Dismissal Order* The trial court does not cite a law in which the court is bound to regarding the dismissal. The court has held that generally parents not be allowed to litigate for children, but as previously explained, that is a ruling in which can be held with exceptions. One such exception has been made in the case of *Maldonado*, as cited in the responses.

It it further supported by this Court’s ruling in *Myers v Loudoun County Public Schools*, which this Court held; [the] “infant is always the ward of every

court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him." *Doe v. Bd. of Educ.*, 165 F.3d 260, 264 (4th Cir.1998) (quoting *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir.1998) (holding that appellate court has an obligation sua sponte to inquire into whether pro se parent had authority to litigate claims on behalf of his minor children)).”

By premature dismissal of this action, the trial court has ensured that no relief be granted from the injustice done to him.

The trial court relies on *A.M. EX REL. J.M. v. NYC DEPT. OF EDUC.* 840 F.Supp.2d 660 (2012), in reviewing if this case has merit in the appointment of counsel. The trial court in this review, should at the lowest level of care and consideration, consider and investigate all facts and allegations properly pleaded, and when considering a summary dismissal, should consider the facts liberally construed in favor of the plaintiffs. The Court utilized an assumption of facts standard, and instead, errs more on the severity of the suspension, textually applied, than the nature of the suspension. While a two-day suspension is not as severe as a ten-day, the offense charged, could have resulted in expulsion, and as such, should be read to that extent.

The trial court does in fact review on the initial suspension, but fails of its own to remark or review the remaining question of law and of fact behind the administrative appeals process. The Court failing to rule on the entire merit of the Complaint, is similar to the abuse of discretion rules in *Hodge v Police Officers*. Which stated in part that indigent prisoners filing a habeas corpus petition are often granted counsel appointments as they are unable to do the necessary fact finding themselves, and may not be able to stand for themselves in court proceedings. Under *Gallo*, a minor cannot stand for themselves, and a minor is often unable to complete the fact finding necessary to make a fully valid claim.

6. The trial court erred in relying on *Hardwick v Heyward*, 711 F.3d 424, 434 (4th Cir. 2013) in holding that this case should be dismissed.

The trial court relies on *Hardwick v Heyward*, 711 F.3d 424, 434 (4th Cir. 2013) where this court explained that “because school officials are far more intimately involved with running schools than federal courts are, it is axiomatic that federal courts should not lightly interfere in day-to-day operations.”

While it is true that school administrators deal with the perils of student contact on a daily basis, that alone does not block or prohibit a claim of a constitutional rights violation. Citing *Hardwick* here, would draw that no such

claim of a civil rights violation, could ever be brought against a school, unless the claim is of a very-specific variety, which is in complete contradiction to the purpose of *Goss v Lopez*, which did in fact rule on such minor suspensions.

Furthermore, the court failed to acknowledge the exact content of the “give and take hearing”, which was more geared toward re-assimilating the minor to class for his safety, as because of the school’s reckless indifference to the rights of the minor, students began to make threats to his safety at home and school. The hearing conducted was strictly “take.” It was done in accordance with a request to make sure the minor was able to safely return to school. Therefore, for the foregoing reasons, a “substantial claim³” to appoint counsel has been made, and the trial court should be found in error.

7. The trial court erred in ruling on the alleged “threat”, in regard to its “resembling threats of violence” *Bell v Itawamba Cty. Sch. Brd.* 799 F.3d 379, 393 (5th Cir. 2015)

The trial court in its footnotes of the Dismissal Order draws reference to Bell. While it is agreed upon by both Plaintiffs that the holding in Bell holds true, the remarks do not meet the requirements set forth to be deemed a threat, or

³ In considering a substantial claim, the Court should look at a case which might likely be of substance. Not one which might not be the one triumphant at trial, but should attempt to view the facts alleged under something similar to a probable cause standard. “If the Complaint is read as true, could there be a constitutional violation?”

anything as such. If the remarks in the instant matter alone resemble a threat, then every student in the United States, or at least in the Williamsburg - James City County School Division should have been suspended equally under constitutional equal protection.

8. The trial court erred in not understanding the nature of the disciplinary action, instead of strictly concerning itself with the severity of the action.

It reigns true that in the United States, a government body in which abuses its discretion, and in disciplinary action, criminal, civil, or administrative, is subject to review on the nature of the action itself, where the nature of the cause of the action. In the appeal filed by Matthew P. Starbuck, joined by Suzanne Starbuck, the school board did not give the minor a fair hearing. He was suspended three hours after school was let out. He did not meet with principals to discuss sanctions or actions. He was interrogated as part of a school safety incident plan, designed for school officials to attempt to play the role of law enforcement and medical professionals by asserting claims of mental health that may be out of their scope of reasonable practice, as they failed to identify themselves or their roles and certifications.

The District Court, being given the opportunity to rule on the nature, overlooked it, erring on the side of the severity, in arguing that “brief suspensions are almost countless. *Dismissal Order*” It is in contrast to this that a person convicted of speeding, nine miles over, has the right to appeal such a “countless” offense to the Circuit Court under Virginia law. The suspension must be looked at as a suspension for what it is, a Level 5 offense by the defendant’s Code of Conduct, and reviewed as such. An offense that is punishable from a lunch detention, to a mandatory ten day suspension, with expulsion recommendation to the Superintendent.

XI. REQUESTED RELIEF

The appellant in this action, prays this Court find:

1. The DISMISSAL ORDER vacated, and this action remanded to the Trial Court for further proceedings in accordance with the ruling.
2. The District Court ordered to appoint counsel in the remanded proceedings, or an exception found and the minor granted the right to appear *pro se* by way of general guardianship.
3. The Court ENTER and PUBLISH a MEMORANDUM opinion of the matter of the appointment of counsel to a minor who is proceeding before a District Court *in forma pauperis*.
4. If this Court denies the foregoing, the Appellant seeks permission to Petition to the United States Supreme Court for Writ of Certiorari.



Matthew P. Starbuck
4615 Sir Gilbert Loop
Williamsburg, Virginia
23185
757-561-6588